NOT INTENDED FOR PUBLICATON

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	CASE NUMBERS
	:	
TINA LASHAWN PITTMAN,	:	
	:	BANKRUPTCY CASE
	:	NO. 03-90154-MGD
Debtor,	:	
_____	:	
	:	
TINA LASHAWN PITTMAN,	:	ADVERSARY CASE
	:	NO. 03-9155
Plaintiff,	:	
	:	
v.	:	
	:	IN PROCEEDINGS UNDER
BANK ONE, N.A.,	:	CHAPTER 7 OF THE
	:	BANKRUPTCY CODE
Defendant.	:	

O R D E R

This adversary proceeding is before the Court on Tina Lashawn Pittman's Motion for Summary Judgment (Adversary Proceeding Docket No. 43) and Bank One, N.A.'s Motion for Summary Judgment (A.P. Docket No. 46). Both Tina Lashawn Pittman and Bank One, N.A. have filed responses to the opposing party's motion for summary judgment (A.P. Docket Nos. 52 and 58). Also on the docket is Tina Lashawn Pittman's Request for Oral Argument (A.P. Docket No. 64). The pleadings do not contest and this Court finds that this proceeding is a core proceeding under 28 U.S.C. § 157 and the Court has jurisdiction pursuant to 28 U.S.C. § 157 (b)(1) and 28 U.S.C. § 1334. The Court has reviewed the record in the case, the motions and the responses and does not consider a hearing to be necessary for a decision on this matter. As a result, the Request for Oral Argument is **DENIED**. Furthermore, for the reasons set forth

below, the Court hereby **DENIES** both motions for summary judgment.

Tina Lashawn Pittman (hereafter "Debtor" or "Plaintiff") commenced this adversary proceeding on May 9, 2003, by filing a complaint seeking a rescission of an August 2000 loan transaction subsequently assigned to Bank One, N.A. (hereafter "Defendant"). Plaintiff alleges that the lender did not comply with the applicable material notice and disclosure requirements mandated under the Truth-In-Lending Act, 15 U.S.C. §§ 1601, et seq. (hereafter "TILA"), and its accompanying regulations in 12 C.F.R. part 226, otherwise known as Regulation Z. Specifically, Plaintiff contends that when refinancing her loan, she was not provided two copies of the Notice of Right to Cancel as required by TILA and as a result is afforded a three year period to seek rescission of the underlying transaction. Plaintiff also alleges that she was charged additional fees on the transaction that were not bona fide or reasonable in amount. Defendant disputes Plaintiff's allegations and timely answered the complaint on June 5, 2003. Defendant counter-claims that if the Court grants rescission, it should be conditioned on the Plaintiff's tender of all property due under the transaction.

FACTS

The material facts appear to be as follows: In August 2000, Plaintiff entered into a balloon note with Homeowners Loan Corporation (hereafter "Homeowners") in the original principal amount of $117,000. (Plaintiff's Response to Defendant's Statement of Material Facts at ¶ 1). Plaintiff also executed and delivered to Homeowners a Security Deed on residential property commonly known as 864 Oakhill Court, Stone Mountain, Georgia. (Plaintiff's Response to Defendant's Statement of Material Facts at ¶ 2). Plaintiff acknowledges that her signature appears on a document which states that Plaintiff received numerous notices and disclosures from the loan transaction, including two copies of a document entitled "Notice of Right to Cancel." (Plaintiff's Response to Defendant's

Statement of Material Facts at ¶ 4). During the three days immediately following the completion of the loan transaction, Plaintiff did not seek to rescind the agreement. (Plaintiff's Response to Defendant's Statement of Material Facts at ¶ 6). Homeowners disbursed funds to pay off a previous loan and disbursed the net proceeds to the Plaintiff. (Plaintiff's Response to Defendant's Statement of Material Facts at ¶ 7). On or about September 11, 2000, the Security Deed was assigned to Defendant. (Plaintiff's Response to Defendant's Statement of Material Facts at ¶ 3). At the time of the assignment of the security deed to Defendant, there were no violations of TILA apparent on the face of the Truth-in-Lending Disclosure Statement. (Plaintiff's Response to Defendant's Statement of Material Facts at ¶ 11). Within the three years of the closing of the loan transaction, Plaintiff has sought a complete rescission. (Defendant's Statement of Material Facts at ¶ 12).

Plaintiff filed her petition under chapter 7 of the Bankruptcy Code on January 6, 2003, and commenced this adversary proceeding on May 9, 2003. Plaintiff seeks damages and the awarding of attorney fees for Defendant's alleged TILA violations and failure to rescind. (Complaint at ¶ 10). Plaintiff also alleges that Defendant charged additional fees on the transaction that were not bona fide or reasonable in amount. (Complaint at ¶ 7). Defendant disputes Plaintiff's allegations that she was not provided with two copies of the Notice of Right to Cancel and that Plaintiff was charged additional fees that were not bona fide or reasonable. (Answer at ¶ 7).

STANDARD FOR THE COURT TO GRANT SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure, applicable herein by Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law." *See also, Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Maniccia v. Brown*, 171 F.3d 1364, 1367 (11th Cir. 1999). In reviewing a motion for summary judgment, the court must view the record and all inferences therefrom in a light most favorable to the moving party. *See WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988). "The party seeking summary judgment bears the initial burden to demonstrate to the [trial] court the basis for its motion for summary judgment and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions which it believes show an absence of any genuine issue of material fact . . .. If the movant successfully discharges its burden, the burden then shifts to the non-movant to establish, by going beyond the pleadings, that there exist genuine issues of material facts." *Hairston v. Gainesville Sun Publ'g. Co.*, 9 F.3d 913, 918 (11th Cir. 1993), *reh'g denied*, 16 F.3d 1233 (11th Cir. 1994). The non-movant may not simply rest on the pleadings, but must show, by reference to affidavits or other evidence, that a material issue of fact remains. Fed. R. Civ. P. 56.

BACKGROUND ON THE TRUTH-IN-LENDING ACT

It is undisputed that the subject transaction is governed by TILA. Congress enacted TILA to regulate the disclosure of the terms of consumer credit transactions in order to assist unsophisticated consumers and prevent creditors from misleading consumers as to the actual cost of financing. *Stanley v. Household Fin. Corp. III, (In re Stanley)*, 315 B.R. 602, 607 (Bankr. D. Kan. 2004), *Morris v. Lomas & Nettleton Co.*, 708 F. Supp. 1198, 1203 (D. Kan. 1989); *Bilal v. Household Fin. Corp. (In re Bilal)*, 296 B.R. 828, 832-33 (Bankr. D. Kan. 2003). Under TILA, a borrower has a right to rescind a credit transaction if a security interest is retained or acquired in the borrower's principal dwelling. 15 U.S.C.A. § 1635.[1] The

[1]Section 1635 provides in relevant part:
(a) Disclosure of obligor's right to rescind

borrower has the absolute right to rescind the transaction for three business days following the later of the consummation of the transaction, the proper delivery of notices of the right to rescind, or the proper delivery of all required material disclosures to all persons with an interest in the dwelling. 15 U.S.C.A. § 1635(a). Furthermore, the failure to provide the borrower with clear and conspicuous material disclosures of the transaction's significant terms as well as two copies of a notice of the right to rescind under TILA extends the borrower's right to rescind the transaction for up to three years.[2] The Board of Governors of the Federal Reserve System has promulgated extensive regulations for implementing TILA which are collectively called Regulation Z.[3]

> Except as otherwise provided in this section, in the case of any consumer transaction ... in which a security interest ... is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of an obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction under this section.
> ...
> (f) Time limit for exercise of right
> An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this part have not been delivered to the obligor....

[2]*See* 15 U.S.C.A. § 1635(f) and 12 C.F.R. § 226.23(a)(3).

[3]Regulation Z, § 226.23(a)(1) provides: "In credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction." Section 226.23(a)(2) continues, "to exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication."

In order to ensure conformity with TILA, the provisions of TILA and Regulation Z are to be absolutely complied with and strictly enforced. *Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983). TILA violations are measured by a strict liability standard imposing liability on the offending creditor even for minor or technical violations. *Stanley* at 607. As a result, the borrower can prevail in a suit brought under TILA without demonstrating that they suffered actual damage as a result of the creditor's violation. *Herrera v. First Northern Sav. & Loan Asso.*, 805 F.2d 896, 900 (10th Cir. 1986).

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff's Motion for Summary Judgment has two central contentions: (1) that Homeowners charged Plaintiff fees that were duplicative and unreasonable, and (2) Plaintiff did not receive two notices of her right to rescind and therefore was afforded an extended period of time for her to exercise her right of rescission. In her motion, Plaintiff appropriately engages in a discussion as to what would be the appropriate relief afforded to Plaintiff as a TILA rescission remedy. However, as detailed *infra*, since the Court is not in a position to grant summary judgment on Plaintiff's rescission claim at this time, the Court will not engage in an analysis of potential TILA rescission remedies.

(A) PLAINTIFF'S CLAIM OF DUPLICATIVE OR EXCESSIVE FEES

Plaintiff asserts that the closing instructions provide for a title examination fee and an abstract or title search fee, and that these charges are duplicative and therefore not bona fide or reasonable. Pertaining to this allegation made by Plaintiff, the Court notes that Plaintiff's summary judgment motion is deficient under the requirements of Bankruptcy Local Rule 7056-1(b) in that Plaintiff did not list the relevant facts in her statement of undisputed facts that

would support her claim.[4] As Defendant has pointed out in its response to Plaintiff's motion for summary judgment, Plaintiff has not asserted a "fact" upon which the Court can predicate a granting of summary judgment.

Nonetheless, notwithstanding Plaintiff's procedural missteps, the Court finds Defendant's response persuasive. The Court notes the fact that, as stated by Defendant, Regulation Z itself refers to title examination and abstract of title as separate and distinct fees.[5] Furthermore, in an affidavit of John P. Rosso,[6] Chief Operating Officer of TransContinental Title, Mr. Russo states that a title search and a title examination are separate charges. (Affidavit of John P. Rosso at ¶ 5). Per Mr. Rosso, a title search is where an individual goes to Court and searches the grantor and grantee indexes and prepares a listing of all transactions effecting a particular property. (Affidavit of John P. Rosso at ¶ 5). Another individual examines the chain of title for possible defects. (Affidavit of John P. Rosso at ¶ 5). The

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[4]Plaintiff's Statement of Undisputed Facts states in its entirety:
(1) Plaintiff borrowed money for personal, family and household purposes.
(2) Plaintiff did not receive two (2) notices of the right to cancel.

[5]Regulation Z, at 15 C.F.R. § 226.4(c)(7) provides, in relevant part, with emphasis added:
(c) Charges excluded from the finance charge. The following charges are not finance charges:
...
(7) Real-estate related fees. The following fees in a transaction secured by real property or in a residential mortgage transaction, if the fees are bona fide and reasonable in amount:
...
(i) Fees for *title examination, abstract of title*, title insurance, property survey, and similar purpose.

[6]Plaintiff, in her response to Defendant's statement of material facts, objects to the utilization of Mr. Rosso's affidavit by Defendant stating that Mr. Rosso was never identified as a witness and therefore his affidavit should be denied. However, Defendant points out that the HUD-1 statement that had previously been provided to Plaintiff identified the "search fee" and "exam fee" as having been paid to Transcontinental Title. When Plaintiff contests whether charges paid to Transcontinental Title are bona fide and reasonable, it seems logical that a representative of Transcontinental Title would provide a response.

Court finds that Defendant has produced evidence that a title search and title examination are separate functions. Accordingly, Plaintiff has failed to meet its burden in order to prevail on summary judgment regarding the allegation that Defendant charged fees that were duplicative and unreasonable.

(B) PLAINTIFF'S CLAIM THAT SHE TIMELY RESCINDED

The gravamen of the competing motions for summary judgment is whether Plaintiff received two copies of the notice of the right to rescind. In order for Plaintiff to prevail in her motion for summary judgment on this Count, she must demonstrate that there exists no genuine issue of material fact. In reviewing the facts in the light most favorable to the Defendant, it is clear to the Court that Plaintiff has not met this substantial burden.

Plaintiff acknowledges that she signed a statement that indicated her receipt of the two required disclosures. The signed statement merely establishes a presumption of delivery which the borrower has an opportunity to rebut. *See* 15 U.S.C. § 1635(c)[7] and *In re Bumpers*, 2003 Westlaw 22119929 (N.D. Ill. 2003). Plaintiff cites *Williams v. First Gov't Mortg. & Investors Corp.*, 225 F.3d 738 (2000) in support of her argument that a signed statement indicating that Plaintiff has received the correct number of required copies forces the borrower to counter the presumption of delivery, but that the burden of proof ultimately remains with the lender. To this end, Plaintiff offers that a statement under penalty of perjury should be satisfactory to rebut the presumption and justify summary judgment in her favor. The Court disagrees. The vast majority of courts hold that a borrower's testimony that the correct number of copies were received creates a question of fact to be decided at trial. *Stanley supra* at 609; *also see Bilal*

[7]Section 1635(c) states, "Written acknowledgment of a receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof."

at 840; *Jones v. Novastar Mortg., Inc. (In re Jones)*, 298 B.R. 451, 459 (Bankr. D. Kan. 2003); *Davison v. Bank One Home Loan Services*, 2003 Westlaw 124542, *4 (D. Kan., 2003); *Cooper v. First Gov't Mortg. & Investors Corp.* 238 F. Supp. 2d 50, 63-65 (D.D.C. 2002); *Hanlin v. Ohio Builders and Remodelers, Inc.*, 212 F. Supp. 2d. 752, 760-62 (S.D. Ohio 2002). Accordingly, Plaintiff has not demonstrated the absence of a genuine issue of material fact and as a result, Plaintiff's motion for summary judgment must be denied.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Likewise, for Defendant to prevail on its summary judgment motion, it must show that the record, when viewed in the light most favorable to Plaintiff, fails on its face to make a showing on an essential element of Plaintiff's case with respect to which Plaintiff has burden of proof. The record before the Court fails this test.

(A) DEFENDANT'S CONTENTION THAT PLAINTIFF TIMELY RECEIVED TWO COPIES OF THE NOTICE OF THE RIGHT TO RESCIND

In its motion for summary judgment, Defendant contends that there is no genuine issue of material fact that Plaintiff received at least two copies of the notice of the right to cancel. It is undisputed that Plaintiff's signature is on a document which states that she received numerous notices and disclosures from the loan transaction, including two copies of a document entitled, "Notice of Right to Cancel."[8] However, as discussed *supra,* this merely creates a rebuttable presumption of delivery. In *In re Bumpers*, 2003 WL22119929 (N.D.Ill. 2003), the district court held that a borrower's signature on TILA disclosures acknowledging receipt merely creates a rebuttable presumption of delivery, and that before her case was dismissed on summary judgment, the borrower should have been given the opportunity to

[8]Plaintiff's Response to Defendant's Statement of Material Facts at ¶ 4.

provide evidence to the bankruptcy court that she did not receive the requisite documents. *Bumpers* at *5. The fact that the closing attorney, Robert Rivers, states in an affidavit that he would not have signed off on a document package given to Plaintiff unless it contained at least two copies of the "Notice of Right to Cancel" merely provides an additional factual element for trial.

Defendant states that Plaintiff was requested to provide a copy of her document file as Exhibit 7 to her deposition. Despite the fact that she had agreed to do so, she failed to bring the file. Defendant asserts that due to Plaintiff's failure to produce her document file, which she has sole control over, an adverse inference unfavorable to Plaintiff must be drawn. (Defendant's Motion for Summary Judgment, p. 10). Defendant contends that this unfavorable inference, in conjunction with the presumption of delivery of the two notices of the right to rescind due to Plaintiff signing a statement evidencing delivery, is sufficient to have the Court determine that no issue of material fact exists as to whether or not Plaintiff received the two notices. While Plaintiff failed to provide the document file per Defendant's request, the unfavorable inference drawn from such an event does not in this instance cause the Court to conclude ultimately that there is no issue of material fact. In situations where the nature of an alleged breach of a discovery obligation is the non-production of evidence, a court has broad discretion in fashioning an appropriate sanction, including the discretion to proceed with a trial and give an adverse inference instruction. *Wechsler v. Hunt Health Systems, Ltd.*, 2003 WL 22358807, *7 (S.D.N.Y., 2003), *Residential Funding Corp. v. DeGeorge Fin. Corp.,* 306 F.3d 99, 107 (2d Cir.Conn. 2002). In this case, the Court does not consider a potentially unfavorable inference to overcome the factual discrepancies sufficient to warrant the granting of summary judgment.

(B) DEFENDANT'S POTENTIAL LIABILITY AS AN ASSIGNEE

Finally, the Court disagrees with Defendant's contention that as an assignee it has no liability to Plaintiff for the alleged violations of TILA. Plaintiff apparently does not dispute the fact that there were no violations of TILA apparent on the face of the truth-in-lending

statement.[9] Section 1641(a)[10] of TILA provides that an assignee of a consumer credit transaction secured by real property is liable only for violations apparent on the face of the disclosure statement.

In *Rowland v. Novus Fin. Corp.*, 949 F. Supp. 1447, 1457-1459 (D. Haw., 1996), it was determined that assignees can be held liable for rescission even if the disclosure violation was not apparent on the face of the documents. The Court points out that while the language in § 1641(a) requires disclosure violations to be apparent on the face of the disclosure statement as a condition precedent to pursue a TILA damages claim against an assignee, this section does not affect potential claims against an assignee for rescission. In fact, § 1641(c) states that § 1641 does not affect the right of a consumer to rescind a transaction against an assignee under § 1635.[11] Since Plaintiff still has an opportunity at trial to demonstrate that she timely rescinded, a claim may still exist against Defendant. If necessary, the Court will further address the potential implication of assignee liability under TILA at trial. Accordingly, it is

ORDERED that both the Plaintiff's and Defendant's motions for summary judgment are hereby **DENIED.**

IT IS FURTHER ORDERED that the parties have thirty (30) days from the entry of this Order to submit to the Court a consolidated pre-trial order that complies with BLR 7016-1.

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[9]Plaintiff's Response to Defendant's Statement of Material Facts at ¶ 11.

[10]1641(a) states in part:
Except as otherwise specifically provided in this subchapter, any civil action for a violation of this subchapter or proceeding under section 1607 of this title which may be brought against a creditor may be maintained against any assignee of such creditor only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement, except where the assignment is involuntary.

[11]1641(c) provides:
Any consumer who has the right to rescind a transaction under section 1635 of this title may rescind the transaction as against any assignee of the obligation.

The Clerk is directed to serve a copy of this Order upon the respective counsel for Plaintiff and Defendant.

IT IS SO ORDERED.

At Atlanta, Georgia, this _____ day of December, 2004.

_____
MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE